RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–210 OF 2002
MOHD SOFIAN JC
19 DECEMBER 2007

Banking — Banks and banking business — Banking regulation — Transfer of business — Vesting order — Whether need to notify borrowers of transferor

Civil Procedure — Guarantee — Charge — Whether plaintiff must foreclose land before commencing legal action against guarantors — Whether clause in guarantee agreement allowed plaintiff to exercise all or any remedies available simultaneously and concurrently

Civil Procedure — Pleadings — Vesting order — Failure to plead transfer of business in statement of claim — Whether transferee had locus standi to sue for recovery of loan

Civil Procedure — Summary judgment — Delay in application for summary judgment — No bona fide defence shown — Whether delay alone could form basis of dismissal of application

Civil Procedure — Summary judgment — Guarantee — Conclusive evidence clause — Whether certificate of indebtedness conclusive — Whether manifest error on face of certificate — Whether there was fraud

The plaintiff instituted a suit against the defendants for the recovery of monies due under credit granted to the first defendant and guaranteed by the second and third defendants and the first defendant's land was charged as security. The learned deputy registrar allowed the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980 against the second and third defendants. Dissatisfied, the defendants filed an appeal to the judge in chambers who had dismissed it and hence this appeal. In resisting the plaintiff's application for summary judgment, the defendants contended that the guarantee document was given to UMBC and not the plaintiff. The defendants further took issue that the plaintiff's statement of claim did not plead the facts of change of name of UMBC to Sime Bank Bhd

A and the subsequent transfer of business to the plaintiff and thus, based on the pleadings, the plaintiff had no locus standi and no cause of action arose against the defendants. The defendants also objected to the imposition of the compound interest on the principal amount and thus raised the issue of correctness of the certificate of indebtedness. The next issue raised by the B defendants was the delay in filing of the application which was said to amount to inordinate delay on the part of the plaintiff. The defendants also stated that the plaintiff should have foreclosed the properties charged before commencing the legal action. In addition to the averment that the guarantee was signed with UMBC and hence the plaintiff had no cause of action against C the defendants as guarantors, the defendants also raised the issue that the letters/notices of demand was not sent to the addresses stipulated in the guarantee document. On the other hand, the plaintiff, in its submission contended that the business was vested pursuant to s 50(3) of the Banking and Financial Institutions Act 1989 ('BAFIA') which provided that no notice D was required to be given in respect of the transfer of property or business. The plaintiff, in reply to the issue of delay, contended that it required more time to locate the documents necessary for the filing of the application.

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Held, dismissing the appeal with costs:

(1) There was no requirement that the notice had to be given to the defendants of the vesting order. Further, s 50(3) of the BAFIA superseded any breach of the rules of procedure arising from the failure F to plead the plaintiff's rights. In any event, the plaintiff was correctly named as a proper party in the suit and had the capacity to bring the action against the defendants. Furthermore, the letters/notices of demand sent by the plaintiff to the defendants clearly mentioned the amount due and owing was to the plaintiff. Thus, the defendants were G not misled or prejudiced by the omission to plead the transfer of business (see paras 20–24).

(2) Since the issue of interest upon interest was not pleaded by the defendants in its amended statement of defence, the defendants should H not be allowed to canvass the issue. However, the clauses in the guarantee allowed the plaintiff to charge interest upon interest or compound interest on the outstanding amount from the date of demand to the date of payment. As such, there was no basis for the defendants' objection to the imposition of the compound interest I (see paras 31–32).

(3) Further, the certificate of indebtedness, after being examined in accordance with the loan and guarantee agreements respectively, were clear enough. There was nothing to suggest any manifest error on the face of the certificate nor was any fraud shown. In the circumstances,

the certificate of indebtedness was conclusive proof of the debt and liability of the defendants (see paras 42–43).

(4) Based on the case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818, there was no basis on the issue of delay in filing the summary judgment application, as the plaintiff had given a plausible explanation for the delay. Further the statement of defence disclosed no bona fide triable issue and to allow it to be defeated solely on the ground there had been a delay would run counter to the interest of justice (see paras 50–51).

(5) Clause 59 of the annexure to the first charge allowed the plaintiff to exercise all or any of the remedies available to it, whether by the charge and civil action simultaneously and concurrently to recover all monies due and owing to the plaintiff. Further, the letters/notices of demand were duly sent and received by the defendants when they were sent to their last known addresses at the time when such letters/notices would in the ordinary course of post be delivered, as implicit from cl 25 of the guarantee agreement (see paras 56–63).

[Bahasa Malaysia summary

Plaintif memulakan tindakan terhadap defendan-defendan untuk mendapatkan semula wang yang tertunggak di bawah kredit yang diberikan kepada defendan pertama yang dijamin oleh defendan-defendan kedua dan ketiga dan tanah defendan pertama digadaikan sebagai sekuriti. Timbalan pendaftar yang bijaksana membenarkan permohonan plaintif untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan-defendan kedua dan ketiga. Tidak puas hati, defendan-defendan memfailkan rayuan kepada hakim dalam kamar yang telah menolaknya dan maka rayuan ini. Dalam menentang permohonan plaintif untuk penghakiman terus, defendan-defendan menghujah bahawa dokumen jaminan tersebut diberikan kepada UMBC dan bukan kepada plaintif. Defendan-defendan selanjutnya membangkitkan isu bahawa pernyataan tuntutan plaintif tidak memplid fakta-fakta penukaran nama UMBC kepada Sime Bank Bhd dan kemudian penukaran perniagaan kepada plaintif dan oleh itu, berdasarkan pliding-pliding, plaintif tidak mempunyai locus standi dan kausa tindakan yang berbangkit terhadap defendan-defendan. Defendan-defendan juga membantah terhadap pengenaan faedah kompaun terhadap jumlah pokok dan oleh itu membangkitkan isu ketepatan sijil keberhutangan. Isu seterusnya yang dibangkitkan oleh defendan-defendan adalah kelewatan dalam memfailkan permohonan tersebut yang dikatakan adalah kelewatan yang melampau oleh pihak plaintif. Defendan-defendan juga menyatakan bahawa plaintif sepatutnya merampas harta yang digadaikan sebelum memulakan tindakan

undang-undang. Tambahan kepada pernyataan bahawa jaminan tersebut ditandatangani dengan UMBC dan oleh itu plaintif tidak mempunyai kausa tindakan terhadap defendan-defendan sebagai penjamin-penjamin, defendan-defendan juga membangkitkan isu bahawa surat-surat/notis-notis tuntutan tidak dihantar ke alamat-alamat yang dinyatakan di dalam dokumen jaminan. Sebaliknya, plaintif di dalam hujahannya menyatakan bahawa perniagaan diletakhakkan menurut s 50(3) Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK') yang memperuntukkan bahawa tiada notis yang perlu diberikan berkenaan dengan pemindahan harta atau perniagaan. Plaintif, dalam jawapannya kepada isu kelewatan, menghujah bahawa ia memerlukan lebih masa untuk mencari dokumen-dokumen yang diperlukan untuk pemfailan permohonan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Tidak terdapat keperluan bahawa notis perlu diberikan kepada defendan-defendan mengenai perintah meletakhak. Lagipun, s 50(3) ABIK menggantikan apa-apa kemungkiran peraturan prosedur berbangkit dari kegagalan untuk merayu hak-hak plaintif. Walau apapun, plaintif telah dengan betul dinamakan sebagai pihak yang sebenar dalam tindakan dan mempunyai kapasiti untuk membawa tindakan terhadap defendan-defendan. Selanjutnya, surat-surat/notis-notis tuntutan yang dihantar oleh plaintif kepada defendan-defendan dengan jelas menyatakan jumlah yang tertunggak dan terhutang adalah kepada plaintif. Oleh itu, defendan-defendan tidak disalah arah atau diprejudis oleh kegagalan memplid penukaran perniagaan tersebut (lihat perenggan 20–24).

(2) Oleh kerana isu faedah terhadap faedah tidak diplidkan oleh defendan-defendan di dalam pernyataan pembelaan terpindanya, defendan-defendan tidak patut dibenarkan untuk membangkitkan isu tersebut. Walau bagaimanapun, klausa-klausa di dalam jaminan membenarkan plaintif untuk mengenakan faedah ke atas faedah atau faedah kompaun terhadap jumlah tertunggak dari tarikh tuntutan sehingga tarikh pembayaran. Oleh itu, tiada alasan bagi bantahan defendan-defendan mengenai pengenaan faedah kompaun (lihat perenggan 31–32).

(3) Selanjutnya, sijil keberhutangan, selepas diteliti masing-masing selaras dengan perjanjian-perjanjian pinjaman dan jaminan, adalah cukup jelas. Tidak ada apa-apa yang menyarankan terdapat sebarang kesilapan yang jelas di atas sijil tersebut mahupun frod ditunjukkan. Dalam hal sedemikian, sijil keberhutangan adalah bukti muktamad mengenai hutang dan liabiliti defendan-defendan (lihat perenggan 42–43).

(4) Berdasarkan kes *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818, tiada asas terhadap isu kelewatan pemfailan permohonan untuk penghakiman terus, kerana plaintif telah memberikan alasan yang munasabah untuk kelewatan tersebut. Tambahan, pernyataan pembelaan tidak memperlihatkan isu bona fide yang boleh dibicarakan dan untuk membenarkannya dipatahkan semata-mata atas alasan bahawa terdapat kelewatan adalah bertentangan dengan kepentingan keadilan (lihat perenggan 50–51).

(5) Klausa 59 kepada lampiran gadaian pertama membenarkan plaintif untuk melaksanakan kesemua atau apa-apa remedi yang ada padanya, sama ada melalui gadaian atau tindakan sivil secara serentak untuk mendapatkan semula kesemua wang yang tertunggak dan terhutang kepada plaintif. Selanjutnya, surat-surat/notis-notis tuntutan telah dihantar dan diterima oleh defendan-defendan apabila ia dihantar ke alamat terakhir mereka apabila surat-surat dan notis-notis tersebut dihantar secara yang sepatutnya dalam urusan pos yang biasa, seperti yang terkandung di dalam kl 25 perjanjian jaminan tersebut (lihat perenggan 56–63).]

Notes

For cases on banking regulation, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1885–1892.

For cases on delay in application for summary judgment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7199–7235.

For cases on guarantee, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7262–7271.

For cases on pleadings in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5186–5821.

Cases referred to

Bangkok Bank Ltd v Cheng Lip Kwong [1990] 2 MLJ 5 (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685 (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

D & C Nomura Merchant Banker's Bhd v Gunung Kuari Sdn Bhd & 3 Ors [1990] 2 CLJ 58 (refd)

Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong [1987] 1 MLJ 139 (refd)

Krishnamurthy & Anor v Malayan Finance Corporation Bhd [1986] 2 MLJ 134 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Oriental Bank Berhad v Jaafar Sidek bin Mohd Salam & 2 Ors [1990] 2 CLJ 72 (refd)
Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd [1989] 3 MLJ 246 (refd)
Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818 (folld)
Phileo Allied Bank (M) Bhd v Koshish Credit & Leasing Sdn Bhd [2002] 1 MLJ 245 (distd)
Sinodaya Industrial Gas Sdn Bhd v Astrol Hover Engineering Sdn Bhd and another appeal [2002] 3 MLJ 354 (refd)
UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177 (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50(3)
Civil Law Act 1956 s 4(3)
National Land Code ss 256, 420, 420(1)
Rules of the High Court 1980 O 14

Lawrence Damian Boudville (Ghazi & Lim) for the plaintiff.
Ooi Meng Kuan (Lim, Ooi & Partners) for the second and third defendants.

Mohd Sofian JC:

[1] The plaintiff a commercial banking institution, instituted this suit against the defendants for the recovery of monies due under credit granted to the first defendant, which was guaranteed by the second and third defendants respectively. To secure the repayment of the facilities, charges were registered in favour of the plaintiff over the first defendant's land.

[2] The first defendant defaulted and failed to make repayment on the facilities. On 24 December 2001 the plaintiff's counsel sent letters/notices of demand to the defendants claiming the sum of RM492,650.53 under the term loan facility and the sum of RM558,169.94 under the overdraft facility as at 15 January 2002 respectively.

[3] The plaintiff by way summons in chambers ('encl 13') dated 29 May 2005 proceeded against the second and third defendants ('the defendants') for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') which was allowed by the learned deputy registrar of the High Court on 29 March 2006. The defendants being dissatisfied with the said decision have filed an appeal to judge in chambers dated 31 March 2006

('encl 26'). On 12 September 2006 the court after reading the written and hearing oral submissions by counsel for both parties dismissed the defendants' appeal with costs and hence this appeal dated 31 October 2006.

THE LAW ON O 14 APPLICATION FOR SUMMARY JUDGMENT

[4] The basic principle applicable is that as stated by Mohamed Azmi SCJ in the *locus classicus* case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 when delivering the majority judgment of the Supreme Court, and I find it necessary to quote from his judgment in extenso (at p 408):

> In our view, basic to the application of all those legal propositions is the requirement under O 14 for the court to be satisfied on the affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. *The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.* On the treatment of conflict of evidence on affidavit, Lord Diplock speaking in the *Privy Council on Eng Mee Yong & Ors v Letchumanan* had this to say at p 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decided a case or matter on affidavit evidence.
>
> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with the undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issue of fact or law, the court must go one step further and determined whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> (Emphasis added.)

[5] There is no dearth of authorities as to the principles of summary judgment on O 14 of the RHC, but for the moment suffices if I also refer to an earlier case of *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 where Hashim Yeop A Sani SCJ (as he then was) had occasion to express as follows at p 184 para D:

> What is involved in the present appeal is the other principle considered in European Asian by Goff LJ (as he then was) that is, what happens when a legal issue is raised by the defence in an O 14 application. In this regard several principles are involved. First, the court hearing an O 14 application should work within the framework of O 14 and not embark on an exercise under O 33 r 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before trial of the cause or matter. Order 33 r 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under O 14 as in any other cases and decide on the question of law. *This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment*.
>
> (Emphasis added.)

[6] At p 185, it was further held:

> *The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim.* The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shout out a defendant. The jurisdiction should only be exercised in very clear case.
>
> (Emphasis added.)

[7] The defendants should be allowed to defend where the court is satisfied from the issue raised and whether in the circumstances of the case there ought to be a trial. It is not enough for the defendant to merely deny the amount owed but the defendant must plead any salient and relevant facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds. See the case of *Huo Heng Oil Co (EM) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139.

[8] It was to be noted that at the hearing of the appeal both the plaintiff and defendants' counsel in addition to the written submissions filed, have also submitted orally on the issue of locus standi but not on the other issues. Nevertheless, the court will consider both the oral as well as the written submissions by both parties.

[9] In resisting the plaintiff's summary judgment application, the defendants raised four issues which are as follows which will be dealt with *in seriatim*:

(1) no locus standi against the defendants;

(2) correctness of the certificate of indebtedness;

(3) delay in filing the summary judgment application;

(4) no cause of action against the defendants as guarantors.

The first issue

[10] It was the defendants' contention that the plaintiff has no locus standi to bring this action against the defendants. The basis for the said argument is that the guarantee document marked as LGT-6 was given to UMBC and not the plaintiff. The defendants further averred that in the Form 13, the name UMBC has been changed to Sime Bank Bhd and subsequently by court order dated 29 June 1999 ('transfer order') the business of Sime Bank Bhd was transferred to RHB. The defendants take issue that the statement of claim did not plead this fact. This is because the cause of action against the defendants accrued on the date of the transfer order. It is not enough that the plaintiff had stated the transfer order and the certified change of name in the plaintiff's affidavit and it would not cure the defect in the plaintiff's statement of claim. The defendants' counsel referred to the case of *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177 which state that:

> The plaintiffs did not plead in the statement of claim the notice of the assignment. In order to claim a right created by statute, every necessary fact must be alleged to bring the case within the statute. The supplemental affidavit deposing the notice of assignment had been served on all the defendants cannot made good any defect or omission in the statement of claim.

[11] The defendants' counsel also referred to the case of *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 where the Supreme Court at p 207 held that:

> This omission is surprising, to say the least and we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence.

[12] The defendants' counsel further submitted that the plaintiff is bound by the pleading and cannot go beyond the pleading. Based on the statement of claim, the plaintiff has no cause of action against the defendants.

[13] The defendant's counsel also referred to *Odgers on Pleading and Practice* (20th Ed) at p 98:

> The statement of claim of such an assignee suing alone must expressly allege:
>
> (a) an absolute assignment;
>
> (b) in writing; and
>
> (c) notice of such assignment;
>
> (d) given in writing to the debtor before the commencement of the action.
>
> For without those averments the case is not brought within the statute and the plaintiff has no right to bring the action.

[14] The plaintiff's counsel in reply to the first issue however distinguished the facts in the *UMW (Sarawak) Sdn Bhd* with the case before the court. In *UMW (Sarawak) Sdn Bhd*, the court held that the plaintiff should have pleaded that notice of assignment had been given to the defendant in accordance to s 4(3) of the Civil Law Act 1956.

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in [the State] before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[15] The plaintiff further submitted that in the instant case, the transfer of any property or business vested was pursuant to s 50(3) of the Banking and Financial Institutions Act 1989 ('BAFIA') which states as follows:

> Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

[16] According to s 50(3) of the BAFIA, no notice was required to be given in respect of the transfer of property or business vested in or held by the transferor on any other person affected which means the defendants in the instant case. The plaintiff's counsel submitted that the decision in *UMW (Sarawak) Sdn Bhd* was decided solely on its own facts and law which is not applicable to the case before the court.

[17] Counsel for the plaintiff also referred the case of *Phileo Allied Bank (M) Bhd v Koshish Credit & Leasing Sdn Bhd* [2002] 1 MLJ 245 where the court dealt on the effect of s 50(3) of the BAFIA on the non-registration of vesting order on enforcement of charges. The facts in *Phileo Allied Bank (M) Bhd* can be briefly stated as follows (at p 245):

> The plaintiff commenced foreclosure proceedings against the defendant on the basis of a ('registered charge 7') pursuant to s 256 of the National Land Code 1965 ('the NLC'). The defendant raised a preliminary objection on the ground that the plaintiff had failed to comply with a vesting order vesting the plaintiff's properties in Malayan Banking Bhd ('the vesting order'). The defendant sought an order that the plaintiff's originating summons be struck out or stayed until the plaintiff had fully complied with the vesting order. The defendant's contention was that the plaintiff could not proceed with the originating summons until the registered charge had been registered in the name of Malayan Banking Bhd by filing the vesting order with the appropriate land authority as provided for under s 420 of the NLC. Section 420(1) of the NLC provides that notwithstanding anything in other written law, no order of the court vesting an alienated land shall affect the land until it has been registered pursuant to that section.

[18] Low Hop Bing J (as he then was) at pp 245–246 dismissed the defendant's preliminary objection with costs and held that:

> Section 50(3) of the BAFIA expressly provides that the vesting order shall have effect according to its terms notwithstanding anything in any law or in any rule of law. Since s 420 of the NLC was already in existence at the time when s 50(3) of the BAFIA was enacted, the intention of Parliament was that the words ' shall have effect according to its terms notwithstanding anything in any law or in any rule of law' under s 50(3) of the BAFIA must meant that the vesting order shall take effect despite the provisions contained in s 420(1) as s 420(1) is clearly and unambiguously overridden by s 50(3). In other words, s 50(3) of the BAFIA which was enacted some 24 years later prevails over s 420(1) of the NLC.

[19] Reverting to the facts of the instant case which can be said to be slightly distinguishable with the facts in *Phileo Allied Bank (M) Bhd*. In the instant case it is not a foreclosure matter but a writ action against the defendants. Nevertheless, the only similarity between the instant case and *Phileo Allied Bank* is that in the instant case the plaintiff had not pleaded that the plaintiff derived its right to sue the defendants vide court order dated

29 June 1999 transferring all the rights and liabilities of Sime Bank Bhd to the plaintiff. In *Phileo Allied Bank* the plaintiff had failed to comply with the vesting order vesting the plaintiff's properties in Malayan Banking Bhd. In the instant case the plaintiff had been vested with the properties of Sime Bank Bhd and had proceeded to sue the defendants to recover the debt in the plaintiff's name. The other averment made by the defendants is that they were not notified by the plaintiff as to how and the manner in which the plaintiff acquired the business of UMBC.

[20] There is no requirement that the notice had to be given to the defendants of the vesting order. However, if the failure to plead the right in respect of the vesting order the right and/or to notify the defendants liabilities then s 50(3) of the BAFIA provides that the vesting order 'shall have effect according to its terms notwithstanding anything in any law or in any rule of law' must meant that the vesting order shall take effect despite the non-compliance with of rules of procedure with regard to pleading.

[21] On this issue, I am in agreement with the sentiments expressed by Low Hop Bing J (as he then was) in *Phileo Allied Bank* at p 251 where His Lordship said that:

> Section 50(3) of the BAFIA provides that the terms of the vesting order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, thereby prevailing over or superseding the provisions of both the Rules of the High Court 1980 and the NLC.

[22] The failure to plead the plaintiff's rights amounts to a breach of rules of procedure which has been superseded by s 50(3) of the BAFIA, a creation of statute giving effect to its terms notwithstanding any in any law or any rule of law.

[23] In any event, the plaintiff is correctly named as a proper party in the suit and had the capacity to bring this action against the defendants. Furthermore, the letters/notices of demand sent by the plaintiff to the defendants clearly mentioned that the amount due and owing was to the plaintiff.

[24] In the opinion of the court, the defendants were not misled or prejudiced by the omission to plead them. With those reasoning, the defendants' argument on the issue of no locus standi is unsustainable.

The second issue

[25] The next issue raised by the defendants is the correctness of the

certificate of indebtedness marked as exh 'LGT-8' to proof the correctness of the amount claimed. The defendants' counsel submitted that the plaintiff had failed to segregate the principal amount and the interest amount in the certificate of indebtedness. Accordingly, the principal amount as stated in the certificate of indebtedness in respect of the fixed loan is the sum of RM492,650.53 and the overdraft is the sum of RM558,169.94 as at 15 January 2002 respectively.

[26] The defendants averred that the plaintiff had added interest on the fixed loan of RM13,312.45 and interest on the overdraft loan of RM8,249.95 respectively to the principal amount. The defendants further alleged that over and above the interests which had been added to the principal amount, the plaintiff had imposed interest upon interest which is called the compound interest on the amount outstanding. The defendants argued that pursuant to cl 2 of the guarantee document the plaintiff was only entitled to charge simple interest and not compound interest on the principal amount. Clause 2 of the guarantee document is reproduced for easy reference.

> This guarantee (hereinafter referred to as 'this guarantee and indemnity') shall be a continuing guarantee and indemnity and the amount recoverable from me/us hereunder is limited to the sum for principal only of Malaysian Ringgit One Million One Hundred Thousand Only (M$1,100,000) together with accrued interest thereon with monthly/yearly rests as the case may be and other charges and costs up to the date of demand by you on me/us for payment (hereinafter referred to as 'the maximum recoverable sum') and thereafter with further interest on the maximum recoverable sum at the prescribed rate from the date of demand to the date of payment For the purpose of ascertaining the limit of the principle sum in this clause, all accumulated and capitalized interest shall be deemed to be interest and not principal sum.

[27] The defendants' counsel cited the case of *Oriental Bank Berhad v Jaafar Sidek bin Mohd Salam & 2 Ors* [1990] 2 CLJ 72 to fortify its argument. The principle as stated in the *Oriental Bank Bhd*'s case is that if there is an apparent defect on the face of the certificate of indebtedness, it is deemed to be not conclusive and will not bind the said defendant. At p 72 of the said case, the learned judge held that:

> The presence of a conclusive evidence clause per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them.

[28] The learned judge further held that:

> Before cl 19 of the guarantee (the circumventing clause) can operate against the defendants the plaintiff must firstly as a condition precedent establish that any certificate it issues on the first defendant's indebtedness is correct and conclusive.

[29] In response to the submission by the defendants' counsel on this issue, the plaintiff's counsel averred that in so far as the issue of interest upon interest, it was not raised anywhere in the pleadings and as such the court should not allow it to be ventilated at this stage.

[30] The plaintiff's counsel referred to the case of *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281 and *Sinodaya Industrial Gas Sdn Bhd v Astrol Hover Engineering Sdn Bhd and another appeal* [2002] 3 MLJ 354 where in these two cases the court held that the defendant was not allowed to raise new issues not referred to in the affidavit.

[31] The court in order to ascertain whether the defendants have pleaded the issue of interest upon interest in its pleading, looked at the amended statement of defence dated 23 July 2003 and found that no such averment was pleaded. The only averment with regard to the interest can be found in para 13 of the amended statement of defence which states as follows:

> 13 Tentang perenggan 16, 17 dan 18 dalam penyataan tuntutan terpinda, defendan ke-2 dan ke-3 menafikan hutang amaun yang dituntut dan berkata amaun yang plaintif tuntut adalah berlebihan dan faedah yang dikira adalah salah dan tidak mengikut syarat-syarat dalam kontrak tersebut dan dalam Perjanjian Jaminan tersebut. Oleh itu defendan ke-2 dan ke-3 berkehendakkan plaintif membuktikan amaun yang dituntut dengan ketat.

[32] Having considered the defendants' pleadings, the court agrees with the views of the plaintiff's counsel that since it was not pleaded in the amended statement of defence, the defendants should not be allowed to canvass this issue.

[33] Be that as it may, looking at the exhs LGT-2 cl 70, LGT-3 cl 42, LGT-4 cl 70, LGT-5 cl 42 and LGT-6 cl 2, the court is of the opinion that those clauses allow the plaintiff to charge interest upon interest or compound interest on the outstanding amount from the date of demand to the date of payment. As such there was no basis for the defendants' objection to the imposition of the compound interest.

[34] The defendants' counsel further averred that the certificate of indebtedness should not be accepted as proof the conclusiveness of the amount of the debt by the defendants. This was because the plaintiff had not provided details as to how the amount was derived at and as such it was defective.

[35] The plaintiff's counsel in reply referred to the case of *Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd* [1989] 3 MLJ 246 where the court held that:

The affidavit affirmed on behalf of the defendants did not condescend into the particulars as to how or only the interest claimed was without any basis and it contains no more than a bare denial. It is one of the established principles in an application under O 14 that the affidavit showing cause must condescend upon particulars.

[36] The court in the instant case looked at exh 'LGT-8' which is the certificate of indebtedness. The amount due and owing under the fixed loan is the sum of RM492,650.53 as at 15 January 2002 with interest accruing at the rate of 8.9% per annum as at 16 January 2002 till 25 February 2002 and thereafter at the rate of 9.9% per annum as at 26 February 2002 till full realisation. In respect of the overdraft loan, the amount due and owing is the sum of RM558,169.94 as at 15 January 2002 till 25 February 2002 at the interest rate of 9.9% per annum as at 26 February 2002 till full realisation.

[37] There are numerous authorities on the issue of the conclusiveness of the certificate of indebtedness which are often referred to.

[38] In the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 the Federal Court held that:

Held (4) 'In this case the respondents were bound under the contract of guarantee to accept the certificate of indebtedness duly executed by the Vice-President of the bank as conclusive evidence of debt due to the bank'.

[39] In *D & C Nomura Merchant Banker's Bhd v Gunung Kuari Sdn Bhd & 3 Ors* [1990] 2 CLJ 58 at p 60 the court held that:

Section 4.01 provides that the guarantee will be in addition to other security and by section 7.04 it was agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the first defendant. In the instant case there is such a certificate of indebtedness under the hand of an authorised officer of the plaintiff bank. The judgment of Shankar J in *MIMB v G & C Securities* (unreported) and the judgment of *Bank Bumiputra Malaysia Bhd v Doric Development Sdn Bhd* [1988] 1 MLJ 462, at p 463 provided authority for the proposition that such a certificate is indeed binding unless there is a manifest error.

[40] In *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5 at p 8 thereof, Yong Pung How J (as he then was) held that:

What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt.

[41] Finally, in the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 on this issue the Federal Court granted leave to appeal to the appellant and to pose two questions namely (at p 688):

(1) whether a certificate of indebtedness issued in accordance with the express provisions of the contract which provide that the certificate is final and conclusive of the matters stated therein if final and conclusive evidence of the amount in the absence of any manifest error on the certificate;

(2) whether apart from producing a certificate of indebtedness pursuant of contract which provided that the certificate was final and conclusive of the matters stated therein, the appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment.

The Federal Court held that:

(3) A certificate of indebtedness operates in the field of adjective law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim.

(4) There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was there any fraud shown. In the circumstances and given the authorities cited, the answer to the first question must be in the affirmative whereas the second question had to be answered in the negative.

[42] In conclusion, the court in the instant case having examined exh LGT-8 issued in accordance with cll 2, 42 and 70 of the loan and guarantee agreements respectively are clear enough. The defendants' affidavit filed did not condescend into the particulars as to how the interest claimed was without any basis.

[43] There is nothing to suggest any manifest error on the face of the said certificate nor is any fraud shown. In the circumstances of the case, the court is of the view that the certificate of indebtedness in exh LGT-8 issued by the plaintiff's vice president dated 25 April 2005 is conclusive proof of the debt and liability of the defendants.

The third issue

[44] According to the defendants' counsel, encl 13 was filed on 29 May 2005 which was 20 months after the amended writ was served on the defendants' counsel that was on 18 March 2003 and this amounted to an inordinate delay on the part of the plaintiff.

[45] In *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134, Salleh Abas LP at p 135 had this to say:

> The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence, provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If his explanation was not accepted by the court no O 14 judgment could be signed. This is the ratio decidendi in *McLardy v Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in *Comptroller-General of Land Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

[46] In the instant case, the plaintiff explained in para 13 of the affidavit in support of the summary judgment application (encl 13) that the delay caused was because the plaintiff required more time to locate the documents necessary for the filing of the application.

[47] The defendants' counsel referred to the case of *Ng Hee Thoong* where there was a delay of 15 months before the summary judgment application was filed. At the High Court hearing the learned judicial commissioner dismissed the summary judgment application on the ground of delay. However, the Court of Appeal reversed the decision of the High Court and Gopal Sri Ram JCA delivering the judgment of the court remarked at p 291 para E held:

> Returning now to the present case, I am of the opinion that the learned judicial commissioner's approach to the question of delay is wrong and against the weight of authority. Faced with the delay and the absence of any admissible evidentiary material, before him, the judicial commissioner should have refused the application altogether.

[48] The plaintiff's counsel on the other hand submitted that *Ng Hee Thoong* is no authority for the proposition that a plaintiff's summons for summary judgment may be defeated solely on the ground of delay in making the application.

[49] The plaintiff's counsel cited the case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818. Gopal Sri Ram JCA who delivered the judgment of the court held at p 821 that:

> In *Ng Hee Thoong* this court reversed the High Court and granted leave to defend principally on the demand had been made of the defendants in that case was plainly arguable. This court also took into account the fact that the plaintiff in that case had remained inactive for more than a year and then moved for summary judgment without giving notice of intention to proceed under the relevant

provision of the Rules. When properly understood, there is nothing in *Ng Hee Thoong*'s case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a provision runs counter to the interests of justice. For delay can surely provide no answer to an application under O 14 where there are no bona fide triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

[50] The court in the instant case would agree with the proposition enunciated by Gopal Sri Ram JCA in the case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor* and ruled that there is no basis on the issue of delay in filing the summary judgment application. The plaintiff had given reasons for the delay and it was a plausible explanation in the circumstances of the case.

[51] The court is also of the view that the statement of defence discloses no bona fide triable issue and to allow it to be defeated solely on the ground that there has been a delay would run counter to the interest of justice. Hence, the defendants' objection is overruled.

The fourth issue

[52] The defendants averred that in law and in fact the guarantee documents exh LGT-2 was signed with United Malayan Banking Corporation and not with the plaintiff. On this basis there is no cause of action against the defendants as guarantors.

[53] The short answer to this proposition in my view has been clearly discussed in the earlier part of my judgment with regard to the issue of locus standi. Pursuant to s 50(3) of the BAFIA clearly gives the right to the plaintiff to commence legal proceeding against the defendants to recover the debt due and owing by the defendants. There is no basis for the averment by the defendants on this issue.

[54] The defendants also relied on an issue as stated in the amended statement of defence at para 12, that the plaintiff should have foreclosed the properties charged to the plaintiff first before commencing the legal action against the defendants. Pursuant to cl 7 of annexure to the first charge (exh LGT-2) the defendants' liability only arise after deducting the amount of the proceed from the auction with the outstanding amount due and owing by the first defendant to the plaintiff. If there was any shortfall in the amount only then would the liability of the defendants arise. In the circumstances of the case, the defendants were of the view that their liability to pay had not arisen yet.

[55] The plaintiff's counsel nevertheless replied by referring to cl 59 of the annexure to the first charge where it allows the plaintiff to commence simultaneous and concurrent proceedings against the defendants to recover all monies due and owing to the plaintiff. The said cl 59 is referred hereto for easy reference:

> Clause 59
>
> Notwithstanding any provisions hereof it is hereby expressly agreed that upon default or breach by the chargor of any term covenant stipulation or undertaking herein provided and on the part of the chargor to be observed and performed the bank shall thereafter have the right to exercise all or any of the remedies available to it whether by this charge or by statute or otherwise and shall be entitled to exercise such remedies concurrently including pursuing all such remedies of sale or possession pursuant to this charge and civil action to recover all moneys due and owing to the bank.

[56] The court agrees with submission made by the plaintiff's counsel that cl 59 entitles the plaintiff to exercise all or any of the remedies available to it whether by this charge and civil action simultaneously and concurrently to recover all monies due and owing to the plaintiff. The defendants' argument on this issue crumbles.

[57] The other issue which is of importance raised by the defendants was with regard to the letters/notices of demand dated 24 January 2002 marked as exh LGT-7 by the plaintiff. According to the defendants, the letters/notices of demand were not sent to the addresses as stipulated in the guarantee document (exh LGT-6). The addresses of the defendants as stipulated in LGT-6 is 'No 16, Solok Indah 2, Taman Bukit Indah, 14000 Bukit Mertajam'.

[58] In the amended statement of claim, the plaintiff stipulated that in paras 3 and 4, the addresses of both the defendants are at No 16, Solok Indah 2, Taman Bukit Indah, 14000 Bukit Mertajam, Pulau Pinang dan/atau No 89 Jalan Cengal 1/3, Taman Cengal Indah, 09000 Kulim, Kedah Darul Aman for the second defendant and No 3, Persiaran Indah, Taman Bukit Indah, 14000 Bukit Mertajam, Pulau Pinang dan/atau di No 89, Jalan Cengal 1/3, Taman Cengal Indah, 09000 Kulim, Kedah Darul Aman for the third defendant respectively.

[59] In the amended statement of defence, the defendants in paras 2 and 3 thereof admitted to the residential addresses as stated in paras 3 and 4 of the amended statement of claim.

[60] The plaintiff's counsel stated that the letters/notices of demand were sent to the defendant's address at No 89, Jalan Cengal 1/3, Taman Cengal Indah, 09000 Kulim, Kedah being the last known address of the defendants.

[61] According to cl 25 of the guarantee agreement which stipulates that 'Any demand for payment or any other demand or notice under this guarantee and indemnity may be made addressed to me/us … and sent by post or delivered to the address above stated or at my/our usual or last known place of business and a demand or notice so sent shall be deemed to have been duly received by me/us or successors and assigns at the time when such letter would in the ordinary course of post be delivered'.

[62] It is implicit from reading cl 25 of the guarantee agreement that the letters/notices of demand could be sent to the defendants' last known addresses and the said letters/notices sent shall be deemed to have been duly received by the defendants at the time when such notice would in the ordinary course of post be delivered.

[63] In this regard the court holds the view that the letters/notices of demand were duly sent and received by the defendants when they were sent to their last known addresses at the time when such letters/notices would in the ordinary course of post be delivered.

[64] In the circumstances, I am of the view that the learned deputy registrar has exercised his judicial discretion correctly and there is no reason for me to disturb it. I would therefore affirm his decision and dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Brendan Navin Siva